

Re: S.B. No. 416 An Act Validating Certain Stipulations to Extensions of Time for the Claims Commissioner to Dispose of a Claim and H.B. No. 5598 An Act Validating the Disposition of Certain Claims by the Claims Commissioner

TESTIMONY OF ATTORNEY BRUCE JACOBS RE: JOANNE LOFBERG,
EXECUTRIX OF THE ESTATE OF ROBERT LOFBERG v. STATE OF CONNECTICUT
FILE NO. 22933

On June 23, 2011, at approximately 2:24 p.m., Robert Lofberg was operating his vehicle, a 2008 Toyota Tundra, on the Boston Post Road in Madison, Connecticut. At that time, it was raining heavily with visibility of only approximately 50 feet. A tree on the south side of Boston Post Road fell and landed on the hood, roof and bed of the Tundra, pinning Mr. Lofberg inside. Mr. Lofberg sustained multiple skull and facial fractures and numerous, extensive intracranial hemorrhages, resulting in his death.

An investigation by the Madison Police Department determined that Mr. Lofberg did not have sufficient time to react or maneuver his vehicle to avoid the falling tree. Furthermore, measurements taken indicated that the vehicle was straight within its lane of travel. The Connecticut Uniform Police Accident Report states, "The tree itself appeared to be on State of Connecticut Department of Transportation property which adjoined the state property of Hammonasset State Park."

On June 24, 2011, Robert Kuchta, a certified tree warden and Inland Wetlands Officer with the Town of Madison, examined the downed tree. He determined that the fallen tree was an Ailanthus Altissima, generally a fast growing weed tree with weak wood strength. He observed a significant decayed area on the southeastern side of the tree, from the base up to above six feet. The tree broke and split at the six-foot elevation. Mr. Kuchta did not observe any signs of a lightning strike in that there was no evidence of exploded bark or wood scattered about or on the remaining trunk. The tree was about 20 inches in diameter at breast height. Mr. Kuchta concluded that the approaching rain storm with heavy rain and some associated wind caused the tree to fall.

The claimant's expert witness, Dr. Terry Tatter resides in the state of Florida. He has a Ph.D. in plant pathology, and has worked as a plant pathologist for the USDA and as a professor of microbiology since the 1970s. He has also published numerous books and articles on the subject of tree pathology and physiology.

Dr. Tatter extensively inspected the police report, including the report of the tree warden and the police photographs. He also made several trips to the scene of this tragic incident. At his deposition on October 14, 2015, Dr. Tatter testified that the tree that killed Mr. Lofberg was a hazard tree that was severely decayed to the point that even a small amount of loading, as from a little bit of wind or rain, could result in a fracture of the entire trunk of the tree, which is what actually occurred -- from the soil to the 6-foot level where the tree broke off and flipped over onto Mr. Lofberg's vehicle. Dr. Tatter testified that, in his professional opinion, this tree should have been removed by the respondent at least ten years prior to Mr. Lofberg's death.

In accordance with Connecticut General Statutes §4-147, a Notice of Claim was sent to the Claims Commissioner, State of Connecticut, via certified mail on March 27, 2012. The respondent filed a motion to dismiss on May 1, 2014. The motion to dismiss was denied by the Claims Commissioner on April 21, 2015. The Office of the Claims Commissioner sent claimant's counsel two requests to stipulate to an extension of time for the years 2015 and 2016, stating that "Failure to [stipulate to an extension] may result in disposition of the above captioned claim." Both were signed by claimant's counsel and returned on February 27, 2015 and April 24, 2015, respectively. On November 24, 2015, the respondent filed a request for stay of proceedings on the ground that the Claims Commissioner lacks jurisdiction over this claim because of the failure to dispose of the claim within two years of the filing of the claim pursuant to Connecticut General Statutes Section 4-159(a)(2).

Joanne Lofberg, the claimant, seeks permission to bring her claim to the Superior Court on behalf of her deceased husband, Robert Lofberg. The standard governing the claims commissioner's determination is a standard of just and equitable, allowing the Commissioner to permit suit where the commissioner finds that the claimant "presents an issue of law or fact under which the State, were it a private person, could be liable." Connecticut General Statutes § 4-160(a). This is an analysis based upon facts and the applicable law.

In other situations in which there are issues of negligent roadside inspection, specifically of damaged trees, resulting in injury when a vehicle on a highway was struck by a falling tree, permission to sue has been granted by the Claims Commission. *Toomey v. State of Connecticut*, CV-91-005183S (February 18, 1994) (State found liable for negligence when a tree on Route 7 fell onto a vehicle during a storm, killing the driver and a passenger and injuring two other passengers)¹ See also, *Horan v.*

¹ "[O]n June 24, 1991 permission to sue was granted to the three plaintiffs by the Claims Commissioner. Pursuant to the Commissioner's decision and Conn. Gen. Stat. 4-160, this action was commenced on or about August 5, 1991." *Toomey* at 1692-93.

Redeker (Permission to sue the state granted when a tree fell on the Merritt Parkway onto a vehicle occupied by the Stavola/Serocke family in 2007, resulting in the deaths of Joseph Stavola and Jeanne Serocke and injuries to their young sons James and William Stavola).²

It is clear that the State of Connecticut through the Department of Transportation is responsible for inspecting and trimming roadside trees, just as the owners of roadside property in the state have been required, for over 100 years, to inspect and monitor roadside trees which pose a threat to travelers. *Toomey, supra*, at 1706. It is well settled that the law requires property owners to guard against probable dangers. *Attardo v. Ambriscoe*, 147 Conn. 708, 712 (1960). They have an affirmative obligation to maintain in safe condition, property under their control. *Nobel v. Housing Authority*, 146 Conn. 197, 200 (1959).

The duties owed by an owner of land abutting a public highway have received a great deal of judicial attention within Connecticut and these cases established beyond question the rule that an owner of property abutting on a highway rests under an obligation to use reasonable care to keep his premises in such condition as not to endanger travelers in their lawful use of the highway; and that if [he or she] fails to do so and thereby renders the highway unsafe for travel, he makes himself liable. . . Irrespective of authority, the rule is one of public necessity.

Toomey, supra, at 1698-99 (emphasis added) (internal quotation marks omitted). This duty was acknowledged as far back as 1871.³

The level of care to which the State is to be held is heightened by the existence of characteristics relating to size, location, age, and species of the tree. *Toomey, supra*, at 1706. The facts of this case clearly support a finding that the State is chargeable with knowledge that this tree was capable of inflicting significant harm and this knowledge raises the degree of care to which it must be held. *Id.* This tree was a menace to public travel and created a specific danger to highway travelers like Mr. Lofberg. It is common knowledge that the Boston Post Road is a heavily-traveled route. Motorists on the Boston Post Road could reasonably assume that the State would maintain the road in such a way as

² Docket No. HHD-CV14-6049960, Superior Court for the Judicial District of Hartford at Hartford, April 2, 2014 (pending trial)

³ "The owner of the trees standing on the highway are liable at common law for injuries occurring in consequence of their neglect to trim them and keep them safe" *Hewison v. City of New Haven*, 37 Conn. 475, 483 (1871).

to achieve a higher level of safety. Adding an even greater duty of care, and an element not present in the other tree cases where permission to sue was granted, the defective tree not only abutted the road, but also a pedestrian and bicycle path in Hammonasset State Park

In the judiciary committee hearing on SB 213, the bill which led to P.A. 98-76,⁴ testimony was given by individuals and their attorneys of their experience in waiting for their claims to be authorized by the claims commissioner. In some cases, claimants were waiting up to three years without a hearing being scheduled. The legislature intended to alleviate the burden to claimants: "I think it's our obligation in the light of the reality of the sovereign immunity of the State and tribes and federal government, etc., that we have to make it as simple as possible to accomplish justice even when the sovereign is involved. So, I'm relatively optimistic this bill will be successful this year and hopefully that you won't and people like yourself in the future won't have to deal with this kind of thing." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1998 Sess., p. 147, remarks of Robert Reardon (emphasis added). Representative Richard D. Tulisano summarized the changes made by P.A. 98-76, explaining that the bill "reduces [the need for] having another hearing and then bringing it to court for a hearing." 41 H.R. Proc., Pt. 8, 1998 Sess., p. 2697. This clearly illustrates that the legislature intended to address the problem of duplicative proceedings and delay in complicated medical malpractice litigation. Duplication and delay are also problems that need to be addressed in complicated cases like this, requiring expert testimony.

Mrs. Lofberg's claim is similar to a medical malpractice claim against the state, like those forming the basis of P.A. 98-76, in that it requires expert testimony in order to prevail. Mrs. Lofberg's case involves extremely complex scientific analysis and testimony regarding the standard of care required in inspecting and removing roadside trees by experts trained in arboriculture, similar to the medical experts that would be required in a medical malpractice case. The experts set to testify in this case are the same individuals who are expected to testify in *Horan v. Redeker* (see note 2, above), in which permission to sue the state was granted.

The clear implication of P.A. 98-76, addressing medical malpractice, is that the duty of the claims commission is to determine if probable cause exists to bring an action against the state—not to try the issues of fact, which is the duty of the court. If it causes undue expense and delay to be required to try a medical malpractice case to the claims commissioner, a similar rationale applies here. Mrs.

⁴ Authorizing the submission of a certificate of good faith in medical malpractice claims and requiring the Claims Commissioner to authorize suit against the state if such a certificate is submitted.

Lofberg's claim has been pending for two years longer than even the older medical malpractice claims referenced above.

Mrs. Lofberg has been waiting almost five years without an opportunity to access the courts to litigate her claim on behalf of her deceased husband. Her counsel has expended \$17,876.22 to date in costs for this complex case, not to mention countless hours researching and preparing for the Claims Commissioner's predisposition hearing, which has now been stayed indefinitely.

The predisposition hearing should not be a de facto trial, with the Claims Commissioner making a determination of which side presents the better expert testimony. That is the role of the trial judge as the trier of fact. Otherwise, a claimant, such as Mrs. Lofberg, would be in the unenviable position of having to prevail twice on the issues of fact – once before the Claims Commissioner and once before the Superior Court. The claimant should not be required to prove anything beyond that she is alleging facts which, if proved true, would give rise to liability to a private individual and that she has expert testimony to substantiate it. The strength of the evidence is for the trier of fact to weigh. The resulting delay and cost is both unjust and inequitable, considering that Mrs. Lofberg has submitted facts and law under which the state, if it were a private person, could certainly (and have been, as in *Toomey, supra*) found liable.

In light of the foregoing, Mrs. Lofberg respectfully requests that the legislature grant her permission to sue the state on behalf of her deceased husband, Robert Lofberg. She appreciates the consideration of this committee.